IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34992

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 410**
	)	
Plaintiff-Respondent,	)	**Filed: April 3, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
FREDERICK JOHN THEDE,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Fred M. Gibler, District Judge.

Judgment of conviction and sentences on conditional plea to trafficking in marijuana and money laundering, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

SCHWARTZMAN, Judge Pro Tem

Frederick John Thede appeals from the district court's denial of his request for a *Franks*[1] hearing to suppress evidence seized pursuant to a search warrant. Thede also argues the district court's sentences are excessive. We affirm.

I.
BACKGROUND

On June 30, 2007, a search warrant was executed on residential property belonging to Thede and his wife, Cathleen. Upon searching the five-acre property, which included a residence and outbuildings, authorities discovered approximately 130 live marijuana plants and 500 harvested and discarded plants, carbon dioxide production and distribution systems,

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[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

elaborate heat lamp systems, automated water and fertilizer systems, and several thousand dollars in cash. Thede and his wife were both charged in separate cases with trafficking in marijuana by manufacturing, Idaho Code § 37-2732B(a)(1)(B), and their criminal complaints were later amended to include money laundering, I.C. § 18-8201(3), (4). The two cases were consolidated for trial.

Thede and his wife filed a motion to suppress and dismiss, asserting that the warrant under which their property was searched was defective. One of the bases for their claim was the assertion that the detective who submitted the affidavit upon which the warrant was issued included statements that were either intentionally false or made with reckless disregard for the truth. The other basis was that some of the information relied upon in the affidavit was stale and that the information did not have a close enough nexus to the actual place to be searched, i.e., the couple's residential property. A hearing was held on their motion and, after some initial confusion as to what was to be discussed at the hearing, it was conducted as a preliminary hearing on whether the Thedes should be granted a full *Franks* hearing regarding the intentional misrepresentations or reckless disregard for the truth allegedly manifested in the warrant's supporting affidavit. The earlier staleness and nexus arguments were not independently raised at the hearing. The district court denied their request for a *Franks* hearing and they subsequently filed a motion for reconsideration of the *Franks* denial and for oral argument on the issues that were raised in the motion to suppress brief but not addressed at the hearing. The record discloses no hearing or ruling from the district court on that motion, perhaps because both defendants pleaded guilty the next day to their respective charges, reserving the right to appeal from the district court's order denying their original motion to suppress and dismiss.[2]

II.
ANALYSIS

A. Whether Thede Was Entitled to a *Franks* Hearing

Thede asserts that the affidavit submitted in support of the search warrant contained statements that were either intentionally false or made with reckless disregard for the truth and

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[2] Defendant's appellate brief does not raise the issue of probable cause for the issuance of the search warrant herein absent a *Franks* hearing.

that as such he was entitled to a *Franks* hearing on whether evidence seized pursuant to that warrant needed to be suppressed. As we have previously noted,

> [T]he United States Supreme Court held [in *Franks*] that a criminal defendant is entitled to an evidentiary hearing to challenge the veracity of evidence used by officers to obtain a search warrant if the defendant makes a substantial preliminary showing that the evidence included an intentionally false statement or a statement made with reckless disregard for the truth. The *Franks* doctrine applies not only to affirmative falsehoods in a warrant application but also to a deliberate or reckless omission of material exculpatory information.

State v. Rounsville, 136 Idaho 869, 871, 42 P.3d 100, 102 (Ct. App. 2002) (citing *State v. Guzman*, 122 Idaho 981, 983-84, 842 P.2d 660, 662-63 (1992); *State v. Peterson*, 133 Idaho 44, 47, 981 P.2d 1154, 1157 (Ct. App. 1999); *State v. Kay*, 129 Idaho 507, 511, 927 P.2d 897, 901 (Ct. App. 1996); and *State v. Beaty*, 118 Idaho 20, 24-26, 794 P.2d 290, 294-96 (Ct. App. 1990)). *See also Franks*, 438 U.S. at 155-156, 171-72. An omission of exculpatory information is material if there is a "'substantial probability' that, had the omitted information been presented, it would have altered the magistrate's determination of probable cause." *State v. Sorbel*, 124 Idaho 275, 279-80, 858 P.2d 814, 818-19 (Ct. App. 1993). *See also Kay*, 129 Idaho at 511, 927 P.2d at 901. It is significant that the misrepresentations must be either intentional or reckless--merely negligent or innocent misrepresentations are insufficient to require a hearing. *Franks*, 438 U.S. at 171; *State v. Fisher*, 140 Idaho 365, 370, 93 P.3d 696, 701 (2004); *Peterson*, 133 Idaho at 48, 981 P.2d at 1158; *Kay*, 129 Idaho at 511-12, 927 P.2d at 901-02. Furthermore, it must be the government agent affiant who made the intentional or reckless misrepresentations--it is not enough for a nongovernmental informant upon whom the affiant relied to have made any such statements. *Franks*, 438 U.S. at 171; *Fisher*, 140 Idaho at 370, 93 P.3d at 701. The defendant's assertions at the preliminary hearing must be specific and supported by an offer of proof. As the Supreme Court said in *Franks*,

> There must be allegations . . . and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, 438 U.S. at 171. *See also Fisher*, 140 Idaho at 370, 93 P.3d at 701; *Rounsville*, 136 Idaho at 872, 42 P.3d at 103. Finally, even if a defendant successfully makes a substantial preliminary showing that the government affiant made misrepresentations intentionally or with

reckless disregard for the truth, a *Franks* hearing will be required only if the misrepresentations were necessary for the finding of probable cause. *Franks*, 438 U.S. at 171-72; *Fisher*, 140 Idaho at 370, 93 P.3d at 701; *State v. Morris*, 131 Idaho 562, 567, 961 P.2d 653, 658 (Ct. App. 1998); *Kay*, 129 Idaho at 511, 927 P.2d at 901.

Here, Thede was granted a preliminary hearing to determine whether he was entitled to a *Franks* hearing, but the court determined that Thede had not made a substantial preliminary showing sufficient to entitle him to one. Thede argues that the district court erred in not granting a *Franks* hearing because he put on a substantial preliminary showing that the detective who submitted the affidavit in support of the application for a search warrant showed a reckless disregard for the truth when he did not independently speak to his Confidential Source of Information's (CSI) alleged eyewitness to the marijuana grow operation, Cherie Hilding, regarding her personal observations. Thede also asserts it was either a deliberate or reckless omission of material exculpatory information for the affiant to not disclose the nature of the romantic relationship between the CSI and Hilding.

We first address Thede's assertion that the detective showed a reckless disregard for the truth in not independently investigating whether Hilding had in fact personally seen the alleged grow operation. Thede represented at his preliminary hearing that Hilding was prepared to testify that she had never observed a marijuana operation at the Thede residence, contrary to her alleged statements to the CSI. Thede also attached other corroborating evidence to the brief for his motion to suppress. Thede asserted at his preliminary hearing and asserts here that the detective's investigation should have included personally asking Hilding whether she had really seen the marijuana operation in person. The district court determined that the detective's failure to personally speak to Hilding did not constitute reckless disregard for the truth, and we agree. The detective's affidavit consisted of nearly seventeen single-spaced pages detailing his investigation into whether there was in fact a grow operation taking place at the Thede residence. Sources of corroborating information for the detective ranged from personal surveillance to analysis of electricity consumption patterns at the Thede residence. We simply cannot say Thede made a substantial showing that the detective showed a reckless disregard for the truth by not personally interviewing Hilding to confirm that she had made statements implicating her friends in a sophisticated marijuana operation. In fact, given the danger of compromising the ongoing investigation through such questioning, one can argue that it would have been quite foolhardy for

the detective to have done so. Moreover, it is not enough that the CSI's statements may have been false. To justify a *Franks* hearing, false testimony must be made deliberately or recklessly by a government affiant, not by a nongovernmental informant. *Fisher*, 140 Idaho at 370, 93 P.3d at 701 (citing *Franks*, 438 U.S. at 171).

We similarly find no error in the district court's refusal to find a substantial preliminary showing that the detective either deliberately or recklessly failed to disclose a material exculpatory fact by not including in his affidavit that the CSI was allegedly involved in a romantic relationship with Hilding. Thede asserts this omission deprived the magistrate of information necessary to determine the CSI's veracity and potential for bias and thus amounted to the omission of a material exculpatory fact. Thede's rationale is that the omitted fact "would have altered the magistrate's determination of probable cause" because it "[goes] directly to [the CSI's] veracity." While this information may certainly have been relevant, the nature of Hilding's personal relationship with the CSI is hardly a matter of consequence, given all the other information provided by the CSI and corroborated by the detective's additional investigations and other reliable sources. Accordingly, such information does not constitute a material exculpatory fact and the district court was correct in not granting a *Franks* hearing based on that omission. Having found no error in the district court's "substantial preliminary showing" analysis, we need not consider whether there would have been probable cause to support the search warrant absent the alleged misrepresentations. *See Franks*, 438 U.S. at 171-72.

B. Whether Thede's Sentences Were Excessive

Thede also asserts that his concurrent sentences of thirteen years with five fixed for trafficking and eight years with four fixed for laundering are excessive. The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender and punishment or retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In examining the reasonableness of a sentence, we conduct an independent review of the record, focusing on the nature of the offense and the character of the offender. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). We will find that the trial court abused its discretion in sentencing only if the defendant, in light of the objectives of sentencing, shows that his sentence was excessive under any reasonable view of the facts. *State v. Charboneau*, 124

Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

In arguing that his sentences are excessive, Thede brings attention to his lack of a criminal history, his remorse and acceptance of responsibility, and his low likelihood of recidivism. While such may be the case, we also note that Thede and his wife, who were allowed to plead guilty to trafficking in a lesser amount of marijuana than was actually found on their property, successfully ran a sophisticated marijuana grow and distribution operation that spanned a number of years and involved both money laundering and significant marijuana production. Having examined the record and considered the objectives of sentencing, we cannot say that the district court abused its discretion in fashioning Thede's sentences.

III.

CONCLUSION

The district court did not err in denying Thede's request for a *Franks* hearing and did not abuse its discretion in fashioning Thede's sentences. We therefore affirm.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**